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ORIGINAL

MEMORANDUM

TO: Docket Control

FROM: Steven M. Olea
Director
Utilities Division

DATE: June 30, 2010

RE: IN THE MATTER OF THE APPLICATION OF BROADVOX-CLEC, LLC FOR APPROVAL OF A CERTIFICATE OF CONVENIENCE AND NECESSITY TO PROVIDE INTRASTATE TELECOMMUNICATIONS SERVICES (DOCKET NO. T-20666A-09-0173)

Attached is the Staff Report for the above referenced application, to provide the following services:

- Resold Long Distance Services
- Resold Local Exchange Services
- Facilities-Based Local Exchange Services

Staff is recommending approval with certain conditions.

SMO:AFF:red

Originator: Armando Fimbres

Attachment: Original and Thirteen Copies

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SERVICE LIST FOR: BROADVOX-CLEC, LLC
DOCKET NO.: T-20666A-09-0173

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STAFF REPORT

UTILITIES DIVISION

ARIZONA CORPORATION COMMISSION

BROADVOX-CLEC, LLC
DOCKET NO. T-20666A-09-0173

IN THE MATTER OF THE APPLICATION OF BROADVOX-CLEC, LLC FOR APPROVAL OF A CERTIFICATE OF CONVENIENCE AND NECESSITY TO PROVIDE INTRASTATE TELECOMMUNICATIONS SERVICES

JUNE 30, 2010

STAFF ACKNOWLEDGMENT

The Staff Report for Broadvox-CLEC, LLC, Docket No. T-20666A-09-0173, was the responsibility of the Staff member listed below. Armando Fimbres was responsible for the review and analysis of the application for a Certificate of Convenience and Necessity to provide resold long distance, resold local exchange; facilities-based local exchange; and petition for a determination that its proposed services should be classified as competitive.

Armando Fimbres
Public Utility Analyst V

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1. INTRODUCTION

On April 6, 2009, Broadvox-CLEC, LLC ("Broadvox-CLEC" or "Applicant" or "Company") filed an application for a Certificate of Convenience and Necessity ("CC&N") to provide resold long distance, resold local exchange and facilities-based local exchange services on a statewide basis in the State of Arizona. The Applicant petitioned the Arizona Corporation Commission ("ACC" or "Commission") for a determination that its proposed services should be classified as competitive.

On April 22, 2009, Staff issued its First Set of Data Requests ("DR1") via email. On July 2, 2009, Staff inquired via email about the status of Broadvox-CLEC's response to DR1. On July 15, 2009, Staff sent a certified letter via regular mail asking for a response to DR1 by July 22, 2009. On July 23, 2009, Staff responded to a July 22, 2009 Broadvox-CLEC email inquiry by explaining that a DR1 response by August 24, 2009 would be acceptable. A DR1 response was not received by Staff. Since Broadvox-CLEC had not responded in a period over 150 days since DR1 was issued, Staff recommended that the application be closed on September 23, 2009. On September 30, 2009, Broadvox-CLEC filed a letter asking for an extension of time until October 30, 2009 to provide responses to DR1. On December 7, 2009, Broadvox-CLEC filed its response to DR1.

On January 8, 2010, Staff issued its Second Set of Data Requests ("DR2") via email. On January 21, 2010, Broadvox-CLEC filed its response to DR2.

On January 22, 2010, Broadvox-CLEC filed a letter asking for cancellation of the $125,000 bond that Broadvox-CLEC filed with the Commission on June 3, 2009. As the bond was prematurely submitted in this matter, Staff supported Broadvox-CLEC's request and recommended that the Compliance Section of the Commission cancel the bond as requested.

On March 5, 2010, Staff issued its Third Set of Data Requests ("DR3") via email to request updated financials and obtain the Applicant's perspective of a complaint[1] filed by Qwest Corporation ("Qwest") in Texas against a Broadvox-CLEC affiliate. The Applicant responded in part on April 7, 2010. Broadvox provided financial statements that it considered to be confidential on April 14, 2010. On March 29, 2010, Broadvox-CLEC filed a revised application removing confidential information mistakenly included in its April 6, 2009 application.

On April 16, 2010, Staff issued a Data Request to Qwest regarding a complaint filed by Qwest in the United States District Court, Northern District of Texas against Broadvox-CLEC affiliates. Qwest responded on May 7, 2010, that it respectfully declined to respond to the data request but, without waiving objections, submitted to Staff a copy of the First Amended Complaint filed in the above court.

[1] Qwest Corporation vs. Broadvox, Inc., Broadvox, LLC, and BroadvoxGo!, LLC, Case no. 4:10-CV-134-A; United States District Court, Northern District of Texas; Filed February 25, 2010, Amended March 8, 2010

Staff's review of this application addresses the overall fitness of the Applicant to receive a CC&N. Staff's analysis also considers whether the Applicant's services should be classified as competitive, if the Applicant's initial rates are just and reasonable, and if approval of the Applicant's CC&N should be conditioned.

2. TECHNICAL CAPABILITY TO PROVIDE THE REQUESTED SERVICES

Broadvox-CLEC is an indirect subsidiary of Broadvox, Inc. & Subsidiary ("Broadvox, Inc.") a company with several subsidiaries.[2] Broadvox-CLEC is a direct subsidiary of Broadvox Holding Co., LLC, which is held directly by Broadvox, Inc. The offices of Broadvox-CLEC are located at 1228 Euclid, Avenue, Suite 390, Cleveland, Ohio 44115. The offices of Broadvox, Inc. are located at 1950 N. Stemmons Fwy, Suite 3031, Dallas, Texas 75207. The information submitted by Broadvox-CLEC represents the business nature of Broadvox, Inc as "... a provider of Internet Protocol telephony and enhanced communications services to telecommunications service providers such as broadband service providers. The Company delivers services ranging from the processing of bulk carrier Voice over Internet Protocol (VoIP) minutes to the turnkey enabling of Hosted Telephony VoIP Services."[3]

In Arizona, Broadvox-CLEC states that its affiliates are "...operating businesses providing VoIP services, and which perform marketing activities in Arizona; some may also purchase information services, and other goods and services used in the businesses, from Arizona vendors."[4]

In Section A-18 of its application, Broadvox-CLEC states that authority to provide telecommunications services had been received in 9 states - Colorado, Idaho, Indiana, Iowa, Kentucky, New Jersey, Rode Island, Vermont and Washington. As of early March 2010, Broadvox-CLEC had gained authority in 32 more states - Alabama, Connecticut, Florida, Georgia, Hawaii, Illinois, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin and Wyoming.[5] However, Broadvox-CLEC states that it has not commenced providing service in any state.[6]

Broadvox, Inc. was founded in 2001 by Mr. Andre Temnorod who remains the Chairman and Chief Executive Officer ("CEO") with a focus on the provision of VoIP technology for

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[2] Broadvox, LLC; BroadvoxGo!, LLC; Broadvox-CLEC, LLC; Origination Technologies; LLC.; Brivia Acquisition, LLC; Broadvox Holding Co., LLC

[3] Broadvox-CLEC, Attachment D, Consolidated Financial Statements, prepared by Skoda Minotti; A more detailed explanation of Broadvox, Inc's company history is available in Attachment A

[4] Broadvox-CLEC response to staff data request 1.4

[5] Confirmed by Broadvox-CLEC via email dated March 4, 2009

[6] Broadvox-CLEC response to staff data request 1.3 – "Staff will be notified as soon as possible should Broadvox begin providing services in any state before a decision is reached by the Arizona Corporation Commission ("Commission") in this matter."

carriers. Broadvox-CLEC was formed in November 2008[7]. The Broadvox-CLEC Chief Executive Officer and top two (2) executive officers have over 27 years of combined telecommunications and related technology experience. Based on the information submitted by the Applicant and subsequent Staff research, Staff believes that Broadvox-CLEC possesses the technical capabilities to provide the services it is requesting the authority to provide.[8]

3. FINANCIAL CAPABILITY TO PROVIDE THE REQUESTED SERVICES

Broadvox-CLEC is a direct subsidiary of Broadvox Holding Co., LLC, a direct subsidiary of Broadvox, Inc. As such the Applicant indicated in section (B-3) of its CC&N application that its parent's financial resources would be utilized for support and submitted Broadvox, Inc. consolidated financials for 2007, 2008 and 2009. Broadvox, Inc. reported total assets of $15.5 million, total shareholders equity of $6.2 million and net income of $7.7 million for end-of-year 2009.

Staff believes that advances, deposits, and/or prepayments received from an Applicant's customers should be protected by the procurement of either a performance bond or an Irrevocable Sight Draft Letter of Credit ("ISDLC"). However, the Broadvox-CLEC states in section (A-15) of its CC&N application that it will not collect advances, prepayments or deposits. The Applicant's proposed Tariff No. 1, Sections 2.8 and 2.9, and proposed Tariff No. 2, Sections 2.5.4 and 2.5.5, confirm this stated practice.

Since the Applicant is requesting a CC&N for more than one kind of service, the amount of a performance bond or the ISDLC for multiple services is an aggregate of the minimum bond or the ISDLC amount for each type of telecommunications service requested by the Applicant. The Commission's current performance bond or ISDLC requirements are $10,000 for resold long distance (for those resellers who collect deposits, advances or prepayments), $25,000 for resold local exchange, $100,000 for facilities-based long distance and $100,000 for facilities-based local exchange services. Based on the services the Applicant is requesting authority to provide, the minimum recommended performance bond or ISDLC should be $135,000. The performance bond or ISDLC coverage needs to increase in increments equal to 50 percent of the total minimum performance bond or ISDLC amount when the total amount of the deposits is within 10 percent of the total minimum performance bond or ISDLC amount. Further, measures should be taken to ensure that the Applicant will not discontinue service to its customers without first complying with Arizona Administrative Code ("A.A.C.") R14-2-1107.

The Applicant will not be collecting deposits, advances, or prepayments, therefore, Staff recommends that the Applicant procure a performance bond or the ISDLC equal to $135,000. The minimum performance bond or the ISDLC amount of $135,000 should be increased if at any time it would be insufficient to cover advances, deposits, and/or prepayments collected from the Applicant's customers. The performance bond or the ISDLC amount should be increased in

[7] T-20666A-09-0173, CC&N application, Attachment A

[8] Staff research consists of general internet searches, FCC website searches and review of Broadvox-CLEC's home page

increments of $67,500. This increase should occur when the total amount of the advances, deposits, and prepayments is within $13,500 of the performance bond or the ISDLC amount. If the Applicant desires to discontinue service, it must file an application with the Commission pursuant to A.A.C. R14-2-1107. Additionally, the Applicant must notify each of its customers and the Commission 60 days prior to filing an application to discontinue service. Failure to meet this requirement should result in forfeiture of the Applicant's performance bond or the ISDLC.

Staff further recommends that proof of the above mentioned performance bond or an ISDLC be docketed within 90 days of the effective date of a Decision in this matter or 10 days before the first customer is served, whichever comes first. Staff also recommends that the Company notify Staff through a compliance filing when the first customer has been served. The original bond or ISDLC should be filed with the Commission's Business Office and copies of the bond or ISDLC with Docket Control, as a compliance item in this docket. The performance bond or ISDLC must remain in effect until further order of the Commission. The Commission may draw on the bond or ISDLC on behalf of, and for the sole benefit of the Applicant's customers, if the Commission finds, in its discretion, that the Applicant is in default of its obligations arising from its Certificate. The Commission may use the bond or ISDLC funds, as appropriate, to protect the Applicant's customer and the public interest and take any and all actions the Commission deems necessary, in its discretion, including, but not limited to returning prepayments or deposits collected from the Applicant's customers.

4. ESTABLISHING RATES AND CHARGES

The Applicant would initially be providing service in areas where an incumbent local exchange carrier ("ILEC"), along with various competitive local exchange carriers ("CLECs") and interexchange carriers are providing telephone service. Therefore, the Applicant would have to compete with those providers in order to obtain subscribers to its services. The Applicant would be a new entrant and would face competition from both an incumbent provider and other competitive providers in offering service to its potential customers. Therefore, the Applicant would generally not be able to exert market power. Thus, the competitive process should result in rates that are just and reasonable.

Both an actual rate and a maximum rate may be listed for each competitive service offered. Should only one rate be listed, that actual rate should be assumed to equal the maximum rate. The rate charged for a service may not be less than the Company's total service long-run incremental cost of providing the service pursuant to A.A.C. R14-2-1109.

The rates proposed by this filing are for competitive services. In general, rates for competitive services are not set according to rate of return regulation. Staff obtained information from the Company indicating that its net book value or fair value rate base at the end of its first 12 months of operation would be less than $1,000.

Broadvox-CLEC submitted Tariff No. 1 and No. 2 with its application. Revisions to both tariffs were submitted in response to Staff's data requests. Staff has reviewed these rates and believes they are comparable to the rates charged by competitive local carriers, local incumbent carriers and major long distance carriers operating in the State of Arizona. The rate to be ultimately charged by the Company will be heavily influenced by the market. Therefore, while Staff considered the fair value rate base information submitted by the Company, the fair value rate base information provided should not be given substantial weight in this analysis.

5. LOCAL EXCHANGE CARRIER SPECIFIC ISSUES

Issues related to the provision of that Local Exchange service are discussed below.

5.1 Number Portability

The Commission has adopted rules to address number portability in a competitive telecommunications services market. Local exchange competition may not be vigorous if customers, especially business customers, must change their telephone numbers to take advantage of a competitive local exchange carrier's service offerings. Consistent with federal laws, federal rules and A.A.C. R14-2-1308(A), the Applicant shall make number portability available to facilitate the ability of a customer to switch between authorized local carriers within a given wire center without changing their telephone number and without impairment to quality, functionality, reliability or convenience of use.

5.2 Provision of Basic Telephone Service and Universal Service

The Commission has adopted rules to address universal telephone service in Arizona. A.A.C. R14-2-1204(A) indicates that all telecommunications service providers that interconnect into the public switched network shall provide funding for the Arizona Universal Service Fund ("AUSF"). The Applicant will make the necessary monthly payments required by A.A.C. R14-2-1204(B).

5.3 Quality Of Service

Staff believes that the Applicant should be ordered to abide by the quality of service standards that were approved by the Commission for Qwest (f/k/a USWC) in Docket No. T-01051B-93-0183 (Decision No. 59421). Because the penalties developed in that docket were initiated because Qwest's level of service was not satisfactory and the Applicant does not have a similar history of service quality problems, Staff does not recommend that those penalties apply to the Applicant. In the competitive market that the Applicant wishes to enter, the Applicant generally will have no market power and will be forced to provide a satisfactory level of service or risk losing its customers. Therefore, Staff believes that it is unnecessary to subject the Applicant to those penalties at this time.

5.4 Access to Alternative Local Exchange Service Providers

Staff expects that there will be new entrant providers of local exchange service who will install the plant necessary to provide telephone service to, for example, a residential subdivision or an industrial park much like existing local exchange companies do today. There may be areas where the Applicant installs the only local exchange service facilities. In the interest of providing competitive alternatives to the Applicant's local exchange service customers, Staff recommends that the Applicant be prohibited from barring access to alternative local exchange service providers who wish to serve such areas. This way, an alternative local exchange service provider may serve a customer if the customer so desires. Access to other providers should be provided pursuant to the provisions of the 1996 Telecommunications Act, the rules promulgated there under and Commission rules on interconnection and unbundling.

5.5 911 Service

The Commission has adopted rules to address 911 and E911 services in a competitive telecommunications services market. The Applicant has certified that in accordance with A.A.C. R14-2-1201(6)(d) and Federal Communications Commission 47 CFR Sections 64.3001 and 64.3002, it will provide all customers with 911 and E911 service, where available, or will coordinate with ILECs and emergency service providers to provide 911 and E911 service.

5.6 Custom Local Area Signaling Services

Consistent with past Commission decisions, the Applicant may offer Caller ID provided that per call and line blocking, with the capability to toggle between blocking and unblocking the transmission of the telephone number, are provided as options to which customers could subscribe with no charge. Also, Last Call Return service that will not return calls to telephone numbers that have the privacy indicator activated, indicating that the number has been blocked, must be offered.

6. REVIEW OF COMPLAINT INFORMATION

The Applicant states that it has neither had an application for service denied, nor had its authority to provide service revoked in any state. Staff is unaware of any formal complaint proceedings or criminal proceedings against the Applicant. Staff, however, has found evidence of one civil complaint proceeding, information for which is provided below. Consumer Services reports no complaint history within Arizona.

The Applicant indicated that none of its officers, directors or partners have been involved in any civil or criminal investigations, or any formal or informal complaints.[9] The Applicant also indicated that none of its officers, directors or partners have been convicted of any criminal acts in the past ten (10) years. Staff's internet research did not reveal any issues related to the top executives in Broadvox-CLEC.

The complaint filed in the United States District Court, Northern District of Texas, against Broadvox-CLEC affiliates is of interest in this proceeding as its outcome may impact the resources of the Broadvox-CLEC parent, Broadvox, LLC, and, thereby, the business direction of

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[9] Qwest's civil complaint was filed after the CC&N application by Broadvox-CLEC.

Broadvox-CLEC.[10] In its complaint, Qwest alleges that for years Broadvox, LLC and BroadvoxGo!, LLC have been misrepresenting the types of calls they are transporting to avoid paying Qwest and other phone companies appropriate access charges.

As summarized in TR Newswire on March 3, 2010, "According to Qwest, Broadvox is "dressing long distance calls in the clothes of local calls to get an unauthorized discount which it does not deserve." Qwest said that "a number of clever parties, including Broadvox, have figured out how to disguise long distance calls as local calls in order to make money. Having been discovered, Broadvox, through a semantic sleight of hand, still refuses to pay Qwest's federal and state-tariffed charges for using its local telephone connections." Qwest first amended complaint adds to the original complaint and is provided with this report as Attachment B.[11]

While Broadvox-CLEC has not had an opportunity to address Qwest's complaint in a legal proceeding, the complaint alleges actions that bear on Arizona and, therefore, the status of the complaint is one that Staff believes should be followed to its conclusion.

7. COMPETITIVE SERVICES ANALYSIS

The Applicant has petitioned the Commission for a determination that the services it is seeking to provide should be classified as competitive.

7.1 Competitive Services Analysis for Local Exchange Services

7.1.1 A description of the general economic conditions that exist, which makes the relevant market for the service one that, is competitive.

The local exchange market that the Applicant seeks to enter is one in which a number of CLECs have been authorized to provide local exchange service. Nevertheless, ILECs hold a virtual monopoly in the local exchange service market. At locations where ILECs provide local exchange service, the Applicant will be entering the market as an alternative provider of local exchange service and, as such, the Applicant will have to compete with those companies in order to obtain customers. In areas where ILECs do not serve customers, the Applicant may have to convince developers to allow it to provide service to their developments.

7.1.2 The number of alternative providers of the service.

Qwest and various independent LECs are the primary providers of local exchange service in the State. Several CLECs and local exchange resellers are also providing local exchange service.

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[10] Broadvox, LLC and BroadvoxGo!,LLC
[11] Attachment B, Qwest First Amended Complaint, March 8, 2010

7.1.3 The estimated market share held by each alternative provider of the service.

Since Qwest and the independent LECs are the primary providers of local exchange service in the State, they have a large share of the market. Since the CLECs and local exchange resellers have only recently been authorized to offer service they have limited market share.

7.1.4 The names and addresses of any alternative providers of the service that are also affiliates of the Applicant, as defined in A.A.C. R14-2-801.

None in Arizona.

7.1.5 The ability of alternative providers to make functionally equivalent or substitute services readily available at competitive rates, terms and conditions.

ILECs have the ability to offer the same services that the Applicant has requested in their respective service territories. Similarly many of the CLECs and local exchange resellers also offer substantially similar services.

7.1.6 Other indicators of market power, which may include growth and shifts in market share, ease of entry and exit, and any affiliation between and among alternative providers of the service(s).

The local exchange service market is:

a. One in which ILECs own networks that reach nearly every residence and business in their service territories and which provide them with a virtual monopoly over local exchange service. New entrants are also beginning to enter this market.

b. One in which new entrants will be dependent upon ILECs:

   1. To terminate traffic to customers.
   2. To provide essential local exchange service elements until the entrant's own network has been built.
   3. For interconnection.

c. One in which ILECs have had an existing relationship with their customers that the new entrants will have to overcome if they want to compete in the market and one in which new entrants do not have a long history with any customers.

d. One in which most customers have few, if any choices since there is generally only one provider of local exchange service in each service territory.

e. One in which the Applicant will not have the capability to adversely affect prices or restrict output to the detriment of telephone service subscribers.

7.2 Competitive Services Analysis For Interexchange Services

7.2.1 A description of the general economic conditions that exist, which makes the relevant market for the service one that, is competitive.

The interexchange market that the Applicant seeks to enter is one in which numerous facilities-based and resold interexchange carriers have been authorized to provide service throughout the State. The Applicant will be a new entrant in this market and, as such, will have to compete with those companies in order to obtain customers.

7.2.2 The number of alternative providers of the service.

There are a large number of facilities-based and resold interexchange carriers providing both interLATA and intraLATA interexchange service throughout the State. In addition, various ILECs provide intraLATA interexchange service in many areas of the State.

7.2.3 The estimated market share held by each alternative provider of the service.

The large facilities-based interexchange carriers (AT&T, Sprint, MCI, etc.) hold a majority of the interLATA interexchange market, and the ILECs provide a large portion of the intraLATA interexchange market. Numerous other interexchange carriers have a smaller part of the market and one in which new entrants do not have a long history with any customers.

7.2.4 The names and addresses of any alternative providers of the service that are also affiliates of the telecommunications applicant, as defined in A.A.C. R14-2-801.

None.

7.2.5 The ability of alternative providers to make functionally equivalent or substitute services readily available at competitive rates, terms and conditions.

Both facilities-based and resold interexchange carriers have the ability to offer the same services that the Applicant has requested in their respective service territories. Similarly many of the ILECs offer similar intraLATA toll services.

7.2.6 Other indicators of market power, which may include growth and shifts in market share, ease of entry and exit, and any affiliation between and among alternative providers of the service(s).

The interexchange service market is:

a. One with numerous competitors and limited barriers to entry.

b. One in which established interexchange carriers have had an existing relationship with their customers that the new entrants will have to overcome if they want to compete in the market.

c. One in which the Applicant will not have the capability to adversely affect prices or restrict output to the detriment of telephone service subscribers.

8. RECOMMENDATIONS

The following sections contain the Staff recommendations on the application for a CC&N and the Applicant's petition for a Commission determination that its proposed services should be classified as competitive.

8.1 Recommendations on the Application for a CC&N

Staff recommends that Applicant's application for a CC&N to provide intrastate telecommunications services, as listed in this Report, be granted. In addition, Staff further recommends:

1. That the Applicant complies with all Commission Rules, Orders and other requirements relevant to the provision of intrastate telecommunications services;

2. That the Applicant abides by the quality of service standards that were approved by the Commission for Qwest in Docket No. T-01051B-93-0183;

3. That the Applicant be prohibited from barring access to alternative local exchange service providers who wish to serve areas where the Applicant is the only provider of local exchange service facilities;

4. That the Applicant be required to notify the Commission immediately upon changes to the Applicant's name, address or telephone number;

5. That the Applicant cooperate with Commission investigations including, but not limited to customer complaints;

6. The rates proposed by this filing are for competitive services. In general, rates for competitive services are not set according to rate of return regulation. Staff obtained information from Broadvox-CLEC indicating that its net book value or fair value rate base at the end of 12 months of operation would be less than $1,000. Staff has reviewed the rates to be charged by the Applicant and believes they are just and reasonable as they are comparable to other wholesale transport providers offering service in Arizona and comparable to the rates the Applicant charges in other jurisdictions. The rate to be ultimately charged by the Company will be heavily influenced by the market. Therefore, while Staff considered the fair value rate base information submitted by the Company, the fair value information provided was not given substantial weight in this analysis;

7. That the Applicant offer Caller ID with the capability to toggle between blocking and unblocking the transmission of the telephone number at no charge;

8. That the Applicant offer Last Call Return service that will not return calls to telephone numbers that have the privacy indicator activated;

9. Staff further recommends that the Commission authorize the Applicant to discount its rates and service charges to the marginal cost of providing the services;

Staff further recommends that the Applicant be ordered to comply with the following. If it does not do so, the Applicant's CC&N shall be null and void, after due process.

1. The Applicant shall docket a conforming tariff for each service within its CC&N within 365 days from the date of an Order in this matter or 30 days prior to providing service, whichever comes first.

2. The Applicant shall:

   a. Procure a performance bond or an irrevocable sight draft ISDLC equal to $135,000. The minimum bond or draft amount of $135,000 should be increased if at any time it would be insufficient to cover advances, deposits, and/or prepayments collected from the Applicant's customers. The bond or draft amount should be increased in increments of $67,500. This increase should occur when the total amount of the advances, deposits, and prepayments is within $13,500 of the bond amount or ISDLC amount; and

   b. File the original performance bond or ISDLC with the Commission's Business Office and copies of the performance bond or ISDLC with Docket Control, as a compliance item in this docket, within 90 days of the effective date of a decision in this matter or 10 days before the first customer is served, whichever comes first. The original performance bond or ISDLC must remain in effect until further order of the Commission. The Commission may draw on the performance bond or ISDLC, on behalf of, and for the sole benefit of the Company's customers, if the Commission finds, in its discretion, that the Company is default of its obligations arising from its Certificate. The Commission may use the performance bond or ISDLC funds, as appropriate, to protect the Company's customers and the public interest and take any and all actions the Commission deems necessary, in its discretion, including, but not limited to returning prepayments or deposits collected from the Company's customers;

c. Staff also recommends that the company notify the Commission through a compliance filing within 30 days of the first customer being served; and

3. The Applicant shall abide by the Commission adopted rules that address Universal Service in Arizona. A.A.C. R14-2-1204(A) indicates that all telecommunications service providers that interconnect into the public switched network shall provide funding for the Arizona Universal Fund. The Applicant will make the necessary monthly payments required by A.A.C. R14-2-1204 (B).

Furthermore, Staff recommends that approval of this Application to provide Resold Long Distance, Resold Local Exchange Services and Facilities-Based Local Exchange be conditioned on the following:

1. That, Broadvox-CLEC file in this docket any filings by any party filed subsequent to Qwest's First Amended Complaint filing of March 8, 2010 pertaining to Case No. 4:10-CV-134-A; United States District Court, Northern District of Texas, and,

2. That such filings by any party pertaining to Case No. 4:10-CV-134-A; United States District Court, Northern District of Texas be filed in this docket no later than 30 days following the date of a decision in this matter, or,

3. That such filings by any party pertaining to Case No. 4:10-CV-134-A; United States District Court, Northern District of Texas be filed in this docket no later than 30 days following the date of such filings in the above reference complaint matter.

8.2 Recommendation on the Applicant's Petition to Have its Proposed Services Classified as Competitive

Staff believes that the Applicant's proposed services should be classified as competitive. There are alternatives to the Applicant's services. The Applicant will have to convince customers to purchase its services, and the Applicant has no ability to adversely affect the local exchange or interexchange service markets. Therefore, the Applicant currently has no market power in the local exchange or interexchange service markets where alternative providers of telecommunications services exist. Staff therefore recommends that the Applicant's proposed services be classified as competitive.

ATTACHMENT A

Source: http://www.broadvox.com/History.aspx
Date: 3/4/2010

Broadvox entered the telecommunications market in 2001. It began as a small provider of VoIP services to other carriers but quickly established a reputation for providing a high quality service at a very competitive price. Our business grew quickly and soon Broadvox had established a nationwide network and was known as one of the country's preeminent "carriers' carrier" for VoIP. In 2003, Broadvox began offering SIP origination and termination, which further improved the quality of the voice transmission and expanded our service offerings. Extending the product offering spurred company growth and Broadvox has been financially stable and profitable since the second half of 2003.

The Broadvox mission statement is "To be the premier provider of VoIP, SIP and IP communication applications and services delivered by the most skilled and motivated team in the industry." As we accomplish our mission, our customers' communications needs are met, our partners are enriched and Broadvox continues to be a leader in the world of SIP.

In 2007, Broadvox began the execution of two strategic initiatives. Broadvox expanded its network capacity by over 50% and announced the launch of its retail SIP Trunking business in September. The network expansion was completed in February of 2008 with new Sonus platforms deployed Dallas, Los Angeles and New York City. The sales of Broadvox GO! SIP Trunking began after we successfully added numerous Master Agents and Independent Agents to our VAR Partner Program. Beginning with our first end-user sell in December of 2007 and continuing today, we are approaching a thousand members in our VAR program. With this kind of growth, we have expanded and evolved our organization to support both a wholesale and retail market.

Our senior management team has over eighty years of telecommunications experience and provides leadership to the company and IP community. Today, Broadvox has nearly one hundred employees and has been adding personnel every month. We now have a nationwide group of Channel Directors and Managers to support our partner sales efforts in every region of the country. Broadvox GO! SIP Trunking is growing at double digits every quarter. Moreover, our wholesale team has successfully grown their business segment and we are on target to see revenues continue to meet record levels there as well.

Broadvox is trusted by over 200 domestic and international telecommunications carriers, ASPs, and ISPs to serve their businesses. We have expanded our Network Operations Center personnel to provide 24x7x365 to our wholesale carriers. We have also continued to expand our offerings to them with international toll-free and CNAM now available.

More than 3000 businesses will enjoy the benefits of SIP Trunking as provided by Broadvox before the end of 2010. In order to support this wide variety of customer needs, Broadvox has certified interoperability with more OEMs of IP PBXs, IADs and routers than any other carrier. We are committed to meeting the evolving industry standard for SIP and testing the industry's finest IP appliances and hardware systems under rigorous conditions to ensure they meet our exacting standards.

ATTACHMENT A

Broadvox is committed to maintaining its position as an industry leader of the VoIP revolution and is the service provider of choice for businesses that are interested in the financial and operational benefits of migrating to IP communications. Broadvox is headquartered in Dallas, Texas and has offices in Cleveland, Ohio.

Norman G. Curtright
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Qwest.

May 7, 2010

Ayesha Vohra, Attorney
Legal Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, AZ 85007

Mr. Armando Fimbres
Utilities Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, AZ 85007

Re: Staff's First Set of Data Requests to Qwest Corporation Regarding
Broadvox-CLEC, LLC
Docket No. T-20666A-09-0173

Dear Ms. Vohra and Mr. Fimbres:

This letter is written in response to the above-referenced data request served on Qwest Corporation. Qwest Corporation respectfully declines to respond to the questions asked and the requests made pursuant to the data request, because Qwest Corporation is not a party to Docket No. 09-0173. However, without waiving objections, Qwest Corporation transmits to you with this letter, a copy of its First Amended Complaint filed in the United States District Court, Northern District of Texas, which has been docketed as:

Qwest Corporation vs. Broadvox, Inc., Broadvox, LLC, and BroadVoxGo!LLC, Case no. 4:10-CV-134-A..

The Complaint speaks for itself, and addresses the Defendant's business activities in relation to Arizona in several places. Qwest is not able at this time to state more about the nature and extent of the Defendant entities and their operations in the State of

Arizona. Further, Qwest does not have a position on the actions the Commission should take with respect to the CC&N application requested in Docket No. 09-0173.

Sincerely,

Norman G. Curtright

Cc: Jeff Nodland, Esq.
Reed Peterson
Diane Krpan

CTJ ORIGINAL

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FT. WORTH DIVISION
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

QWEST CORPORATION,	§	
	§	
Plaintiff,	§	4:10-CV-134-A
	§	
vs.	§	**Case No.** ~~4:09-cv-755-A~~
	§	
BROADVOX, INC.,	§	
BROADVOX, LLC,	§	
and BROADVOXGO!, LLC,	§	**JURY TRIAL DEMANDED**
	§	
Defendants.	§	

FIRST AMENDED COMPLAINT

Plaintiff Qwest Corporation ("Qwest"), by and through its undersigned counsel, hereby files its Complaint against Defendants Broadvox, Inc., Broadvox, LLC, and BroadvoxGo!, LLC (collectively, "Broadvox"). Based upon actual knowledge with respect to itself and its own acts, and upon information and belief as to all other persons and matters, Qwest respectfully alleges as follows:

SUMMARY OF THE ACTION

1. This is a case about long-distance telephone call charges. For years, Broadvox has disguised the long-distance calls it handles as local calls, so that it can avoid the access charges imposed by local phone companies like Qwest.

2. Despite advances in technology, most telephone calls still begin with a caller picking up a telephone and dialing a number. When the person on the other end hears the phone ring and picks up the receiver, of course, it may be either a local or a long-distance call. Although the call may have come from next door or halfway around the world, both local and long-distance calls ultimately are delivered by the customer's local phone company, which

handles all the calls made to a particular phone number. All the phone calls at issue here begin and end in standard and familiar telephones, but the methods for transmitting the calls has improved greatly over time.

3. When a local call comes in from a person using a different phone company, the local phone company charges the other company for completing the call. When a long-distance call comes in, the local phone companies for both the caller and the called party charge the companies that transport the call from one local company to the other. By law, the charges are higher for long-distance calls than for local calls. This principle is fundamental to the telecommunications industry and fully supported by an established body of regulations.

4. Qwest is a "Regional Bell Operating Company" -- that is, a "local carrier" -- of telephone services, with local phone service customers in various parts of the United States. It receives phone calls from many companies (in many locations) and delivers those calls to its customers. Like other local carriers, Qwest requires companies delivering long-distance calls to use different connecting wires than when they deliver local calls. This way Qwest can distinguish the two types of calls and bill for them appropriately.

5. For the long-distance phone calls it handles, Broadvox acts as an intermediary, transporting the calls from one phone service carrier to another, often across state lines. Broadvox determines and controls how to deliver the calls to Qwest, which in turn delivers them to its customers. In some instances, Broadvox may convert a long-distance call from an ordinary, circuit-switched format -- the format used to make phone calls for decades -- to Internet Protocol, or "IP," format. All this means is that the call is transported for some portion of its journey by Internet routers and switches. Before delivering the long-distance call to a local phone company like Qwest, however, Broadvox must convert it back to the circuit-switched

format. Then the call reaches Qwest's network, Qwest delivers it to its customer, and the phone in the customer's house rings.

6. The Federal Communications Commission ("FCC") has established that whether a company transports long-distance phone traffic over the Internet (as Broadvox asserts it does) or over traditional telephone lines, it must still pay applicable long-distance charges to local phone companies. Broadvox is free to transport the calls however it wishes, so long as it accurately reports the types of calls it delivers and otherwise follows the law. Unfortunately, it has chosen a different path. To avoid paying the higher charges associated with long-distance calls, Broadvox disguises the long-distance calls it delivers, so that they appear to be ***local*** calls, and therefore get charged at the lower rate available only for local call delivery.

7. For example, Broadvox may deliver (or cause to be delivered) a call to Qwest's office in Denver with information indicating that the call originated locally (area code 303), even though it actually is a long-distance call from Phoenix (area code 602). From that information, and because Broadvox delivers the call over Qwest's facilities intended ***only*** for local calls, Qwest has no idea that it is a long-distance call. Meanwhile, Broadvox avoids the higher charges it should be paying for delivering long-distance calls. Broadvox even advertises to other long-distance providers that it offers a cheaper wholesale call transportation and termination service. If that is true, it is only because Broadvox has misrepresented to Qwest (and other local phone companies) the types of calls it is carrying. In effect, Broadvox has dressed long-distance calls in the clothes of local calls to get an unauthorized discount which it does not deserve. Its conduct is no different than a former student who, long after graduation, uses a school ID card to buy a cheaper movie ticket. Here, however, it is not a few bucks, but millions of dollars, at

stake. For years, relying on excuse after excuse, Broadvox has avoided paying appropriate charges for its long-distance traffic. It is time for Broadvox to pay its bill.

8. Qwest is entitled to recover its access charges from Broadvox, and, in fact, is required to do so by law. The Court should award damages and other relief to Qwest pursuant to the claims set forth below.

INTRODUCTION

9. Despite all the unfortunate acronyms that exist in the telecommunications world, this is not a complicated matter. It is a simple case about greed. A number of clever parties, including Broadvox, have figured out how to disguise long-distance calls as local calls in order to make money. Having been discovered, Broadvox, through semantic sleight of hand, still refuses to pay Qwest's federal and state-tariffed charges for using its local telephone connections.

10. For decades, long-distance phone calls have been made over a physical telephone network of wires and switches. Although a growing number of long-distance calls are now made over the Internet, in what is called "VoIP" (Voice Over Internet Protocol) telephony, the calls at issue here are not originated in that format. The calls at issue here begin with someone (for example, AT&T long-distance customer James in Austin) picking up his telephone and making a call that is sent out over the wires connecting James to his local phone company. The calls end the same way. The person being called (for example, Qwest customer Mary in Albuquerque) receives the call over the wires of her own local phone company, Qwest. It is what happens in the middle of these calls, and specifically, what Broadvox does to these long-distance calls while they are in transit, that is the focal point of the parties' dispute.

11. When a carrier, like Broadvox, asks a local phone company, like Qwest, to "borrow" its local facilities (switches and wires) so that it can deliver a long-distance call to a Qwest local customer (like Mary in Albuquerque), the carrier is required, pursuant to federal statutes, rules, and operative tariffs, to pay Qwest for the use of those facilities. The charges to "borrow" the switches and wires are called "access charges," because the local carrier is providing access to its customers, so the long-distance company can reach them. Only Qwest can "terminate" long-distance calls made to its local customers (in other words, only Qwest can cause Mary's phone to ring), because only Qwest's local facilities connect customers like Mary to the broader public telephone network. Without this "access," non-Qwest customers like James could never make long-distance calls to Qwest customers like Mary.

12. A number of long-distance carriers, formally known as "interexchange carriers" (or "IXCs"), may be involved in transporting an ordinary long-distance call.[1] Broadvox is an IXC that transports, for some period, the long-distance calls in question here. In fact, Broadvox is the last IXC to handle the calls before they are sent to Qwest (and its customers like Mary). To hide the fact that it is actually delivering long-distance calls (that result in higher access charges), Broadvox takes several critical steps to keep itself and its activities hidden from view.

13. First, Broadvox causes the long-distance calls to be delivered to Qwest by another ***local*** phone company that is interconnected with Qwest's network. Broadvox never sends these long-distance calls directly to Qwest itself.

14. Second, by sending the calls to Qwest through this other local phone company, Broadvox ensures that the long-distance calls will come to Qwest on facilities Qwest has designated exclusively for receiving local calls from that other local company.

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1 Long-distance calls are more formally known as "interexchange" calls, and the carriers that carry such calls are known as "interexchange carriers," because the long-distance call leaves the local exchange where it originated to be terminated in a different local exchange, and is thus an "<u>inter</u>exchange call."

15. Third, because Broadvox causes these long-distance calls to be sent to Qwest on such facilities, the long-distance calls are commingled with, and look like, the local calls that are properly coming to Qwest over those local facilities.

16. Fourth, Broadvox changes the call information for the long-distance calls it transports so that, in most cases, a long-distance call appears be coming from a local telephone number by the time it reaches Qwest.

17. Qwest's ability to differentiate local calls from long-distance calls is critical. By law, Qwest charges higher rates to terminate long-distance calls (the call from James to Mary) than local calls (a call from Mary's next-door neighbor). Companies like Broadvox stand to gain from their deception if they can disguise long-distance calls as local calls. Broadvox's business model, at least as to its "IP-termination" services, depends on terminating long-distance traffic for other companies at a lower cost, so it can pocket some of that money. But its savings pursuant to this scheme actually belong to Qwest, in the form of the long-distance access charges Broadvox is required by law to pay.

18. Qwest is authorized and required by law to impose tariffed access charges on IXCs like Broadvox. Broadvox's scheme also violates a well-known rule of telecommunications law that spells out that a carrier like Broadvox cannot immunize itself from its obligation to pay access charges by simply using an Internet format of transport.

19. Specifically, the FCC has held that even if an IXC does use Internet technology to transport ordinary long-distance calls, it still must pay a local exchange carrier's tariffed access charges.[2] The Internet is not a "magic wand" that transforms the nature of the phone calls. James has still picked up his phone in Austin to call Mary in Albuquerque, no matter how many

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[2] *In the Matter of the Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services Are Exempt From Access Charges*, FCC Order No. 04-97, 19 F.C.C.R. 7457 (Docket No. 02-361, April 21, 2004), *available at* 2004 WL 856557 (the "FCC IP-in-the-Middle Order").

companies combine to "carry" the call between the two cities. The FCC has also held that, even if an IXC purports to add various "enhanced features and functions" to long-distance calls -- as Broadvox has claimed in the past -- it still must pay long-distance access charges.[3] In short, the FCC has flatly rejected both arguments that Broadvox offers to excuse its conduct.

JURISDICTION AND VENUE

20. Because Qwest and Broadvox are citizens of diverse states, and because the amount in controversy in Qwest's claims exceeds $75,000.00, exclusive of interest and costs, this Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332. Further, because Qwest's claims include claims for violation of Qwest's tariffs filed and approved at the FCC, relating to interstate long-distance traffic, and having the force of law pursuant to the Communications Act of 1934, 47 U.S.C. § 151 et seq., this Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1337, and 47 U.S.C. §§ 206-07.[4]

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3 *Declaratory Ruling & Report & Order, Regulation of Prepaid Calling Card Services*, 21 FCC Rcd. 7290 (2006) (the "FCC Calling Card Order").

4 In its recent order, the Court directed Qwest to "replead and allege the citizenship of each of the members of Broadvox, LLC and BroadvoxGo!, LLC" in order "properly to allege the citizenship of the parties for the purposes of establishing diversity jurisdiction." Feb. 26, 2010 Order at 1 ("Order"); *see* ¶ 23 *infra*. In addition, the Court cited *MCI Telecommunications Corp. v. Credit Builders of Am., Inc.*, 980 F.2d 1021, 1022-23 (5th Cir.), *opinion reinstated*, 2 F.3d 103 (5th Cir. 1993), concerning Qwest's assertion of federal question jurisdiction over its claims arising under the Communications Act of 1934. Order at 2 n.1. However, a pre-*Credit Builders* opinion from the Fifth Circuit, *American Tel. & Tel. Co. v. Florida-Texas Freight, Inc.* ("*AT&T*"), 485 F.2d 1390 (5th Cir. 1973) (*per curiam*), *aff'g* 357 F. Supp. 977 (S.D. Fla. 1973), constitutes binding circuit precedent confirming that federal courts have jurisdiction over actions "to recover unpaid charges for interstate telecommunications services provided under the terms and conditions of a tariff filed pursuant to the Communications Act of 1934." *MCI Telecommunications Corp. v. United Showcase, Inc.*, 847 F. Supp. 510, 510-11 (N.D. Tex. 1994). As Judge Fitzwater held in *United Showcase*, "the correct rule, recognized at least implicitly in *AT&T*, is that subject matter jurisdiction exists pursuant to 28 U.S.C. § 1337, in conjunction with 47 U.S.C. § 203, because the carrier's claim for payment is based on the filed tariff. . . . [T]here is nothing in congressional action, a Supreme Court decision, or an *en banc* Fifth Circuit opinion to undercut the jurisdictional holding of *AT&T*. Therefore, under settled Fifth Circuit law, the [*Credit Builders*] panel opinion must give way to the binding effect of *AT&T*, and this court must respectfully decline to follow [*Credit Builders*]." *Id.* at 541. Accordingly, there was subject-matter jurisdiction over the claims in United Showcase, just as there is over Qwest's claims in this case. *See id.* Even if this Court disagrees with the holding in *United Showcase*, however, Qwest seeks a declaration construing an order of the Federal Communications Commission and applying that order and the federal Communications Act to Broadvox's conduct, which necessarily involves questions of federal law. *See* ¶¶ 133-37 *infra*.

21. Venue is proper in this judicial district under 28 U.S.C. § 1391(a)(1), as Broadvox is a resident of this judicial district for purposes of venue, as specified in 28 U.S.C. § 1391(c). It is subject to personal jurisdiction in this judicial district.

PARTIES

22. Qwest Corporation is a Colorado corporation with its principal place of business in Denver, Colorado. Qwest provides, among other things, local telecommunications services in Arizona, Colorado, Iowa, Idaho, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming.

23. Broadvox, Inc. is an Ohio corporation with its principal place of business in Dallas, Texas. Broadvox, LLC is a Delaware limited liability company with its principal place of business in Dallas, Texas. The sole member of Broadvox, LLC is Broadvox, Inc. BroadvoxGo!, LLC is a Delaware limited liability company with its principal place of business in Dallas, Texas. The sole member of BroadvoxGo!, LLC is Broadvox, Inc. With regard to the actions alleged in this Complaint, the Broadvox defendants function as one entity (collectively, "Broadvox"). Broadvox operates or utilizes facilities that are used in connection with the transmission of long-distance telephone calls that begin and end in the multiple states in which Qwest does business.

24. Broadvox is a "Telecommunications Carrier,"[5] subject to the provisions of the Communications Act of 1934, as amended, 47 U.S.C. § 151 et seq. (the "Communications Act"), and is subject to the jurisdiction of the FCC and the various state public service commissions ("PSCs"). Broadvox is a common carrier, and as explained herein, Broadvox is also an IXC engaged in the interexchange transport of the long-distance calls at issue.

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5 47 U.S.C. § 153(44).

ALLEGATIONS OF FACT

A. The "Access Charge" Regime and the Difference in Terminating Long-Distance and Local Phone Traffic

25. To understand Broadvox's fraudulent scheme, it is necessary to first see how access charges normally are imposed on long-distance calls.

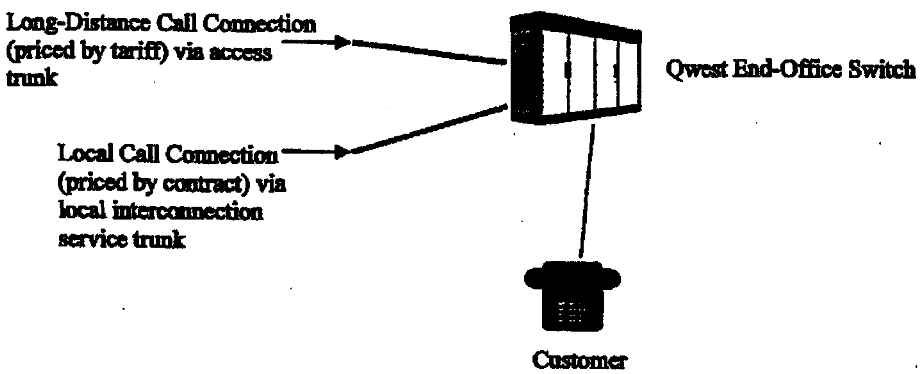
26. Transmitting a long-distance call generally requires local phone companies (generally known in the telecommunications industry as "local exchange carriers" or "LECs") to provide two kinds of switched access service. "Originating" service occurs when a call originates on a LEC's network and is routed elsewhere for completion in a different local exchange. In other words, when James picks up his phone in Austin and dials a number, his LEC provides "originating" switched access service. "Terminating" switched access service occurs when an IXC routes a long-distance call to the called party's carrier for termination. In other words, when Mary hears her phone ring in Albuquerque and answers the call, her LEC (Qwest, in this example) provides "terminating" switched access. The latter is at issue here.

27. Of course, Qwest terminates (or delivers) both long-distance and local calls to its customers. Long-distance calls, however, are routed to Qwest over different facilities than local calls. Long-distance calls must be sent over "access trunk" facilities that connect Qwest's local network to the IXC's network. IXCs order these facilities from Qwest and pay switched access charges for them pursuant to Qwest's federal and state tariffs. This is the only way IXCs can legitimately reach Qwest's customers.

28. Qwest also works with other ***competitive*** local exchange carriers (or "CLECs") to exchange local traffic (for example, calls within the same metropolitan area). Qwest exchanges traffic with the CLECs on the basis of contract, not tariff. These contracts, called interconnection agreements, provide that each carrier compensates the other for the "transport

and termination" of local traffic. So when Mary, a Qwest customer, calls a next-door neighbor who is not a Qwest customer, Qwest must compensate the other company for completing the call. Typically, this exchange of traffic between two LECs occurs over Local Interconnection Service ("LIS") trunks. Qwest's interconnection agreements with CLECs specify that ***only*** local calls may be transmitted over these LIS trunks. Diagram A illustrates this fundamental difference between the routing of long-distance, versus local traffic.

DIAGRAM A



29. If an incoming long-distance call comes from outside the state via an access trunk, Qwest imposes switched access charges based on federal tariffs. If an incoming long-distance call comes from inside the state via an access trunk (from Roswell, New Mexico to Albuquerque, New Mexico, for example), Qwest imposes switched access charges based on state tariffs. These charges are typically assessed for each minute of the call and are designed to recover, in part, the costs of using Qwest's facilities (switches, wires, telephone poles, etc.). Historically, long-distance access charges have helped to keep rates for local telephone service low, which is one reason the charges to complete a long-distance call are significantly higher than the charges to complete a local call. In short, the FCC has established a regime to ensure that local callers may call each other affordably.

30. An important fact about the way access charges work in the multi-company process associated with delivering a long-distance telephone call is that a carrier like Broadvox need not have explicitly ordered services from a LEC like Qwest to be responsible for payment of access charges. Under the Constructive Ordering Doctrine, a carrier that has not directly ordered such services is nonetheless held to have "constructively" ordered or subscribed to them (and is obligated to pay for them) if: 1) the carrier is interconnected in such a manner that it can expect to receive access services; 2) the carrier fails to take reasonable steps to prevent the receipt of access services; and 3) the carrier does in fact receive such services.[6]

B. Broadvox's Evasion of Access Charges

31. To accomplish its unlawful objective of paying less for access than is required by law, Broadvox improperly utilizes a local service designed for exchanging only local traffic, a Primary Rate Interface ("PRI") service. Rather than delivering these calls to Qwest as long-distance calls over access trunk facilities, Broadvox instead delivers them to an intermediate CLEC by way of a PRI service, suggesting to Qwest that these are local calls.

32. Typically, a PRI service connects an "end user," such as a medium- or large-sized business, to the public switched telephone network. This allows the business to make and receive a large volume of calls. Businesses often use PRI services to establish direct-dial numbers for their employees. One of the consequences of delivering calls to CLECs via PRI services is that the billing information transmitted with the call may be changed, making a long-distance call register as a local call when it arrives at Qwest's network. Although Broadvox purchases PRI service from CLECs and uses it to funnel and disguise the long-distance traffic it sends to Qwest, it is not an "end user." Broadvox uses PRI services as conduits for passing long-

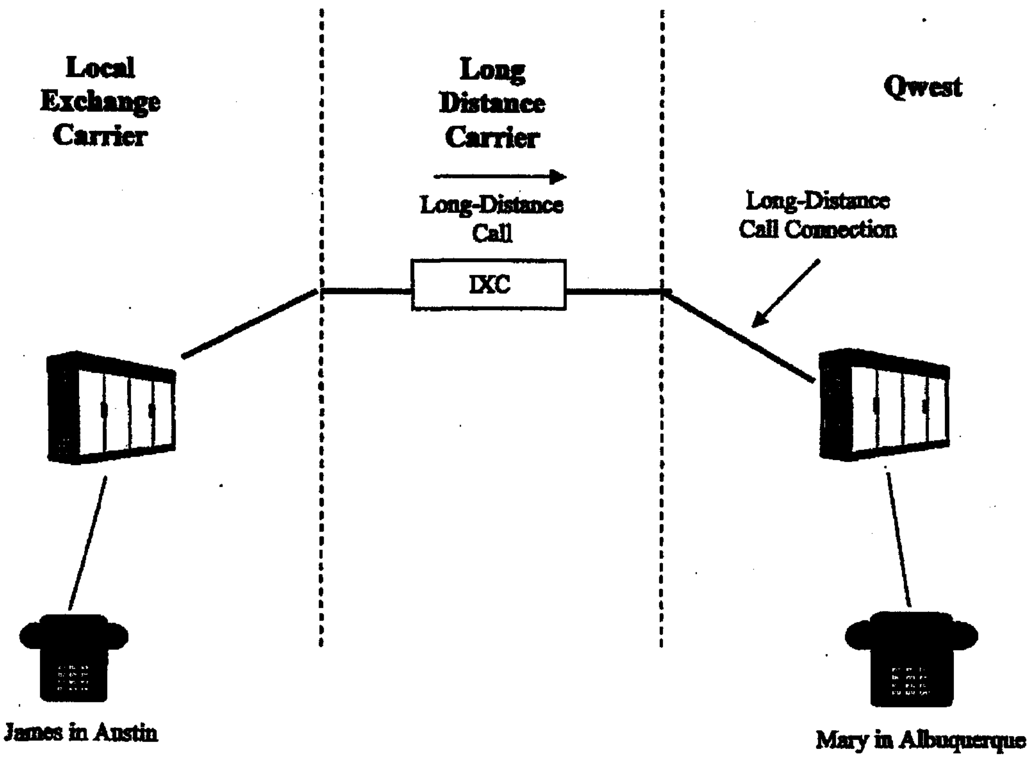
6 *See In re Access Charge Reform*, FCC Order No. 99-206, 14 F.C.C.R. 14221, ¶ 188 (1999).

distance traffic from other IXCs to the CLEC, which then sends the calls to Qwest for termination.

33. Broadvox represents to the CLEC that either the calls it will send along under the PRI service are local calls, or that Broadvox will use these PRI circuits strictly for the provision of "information services" or "enhanced services" (functions that do not include the transport of ordinary long-distance calls). Broadvox has numerous such contracts with different CLECs. The CLEC, which may be complicit in Broadvox's scheme, then routes the disguised long-distance traffic, commingled with true local traffic, to Qwest. It does so over the LIS trunks that are designated exclusively for local traffic.

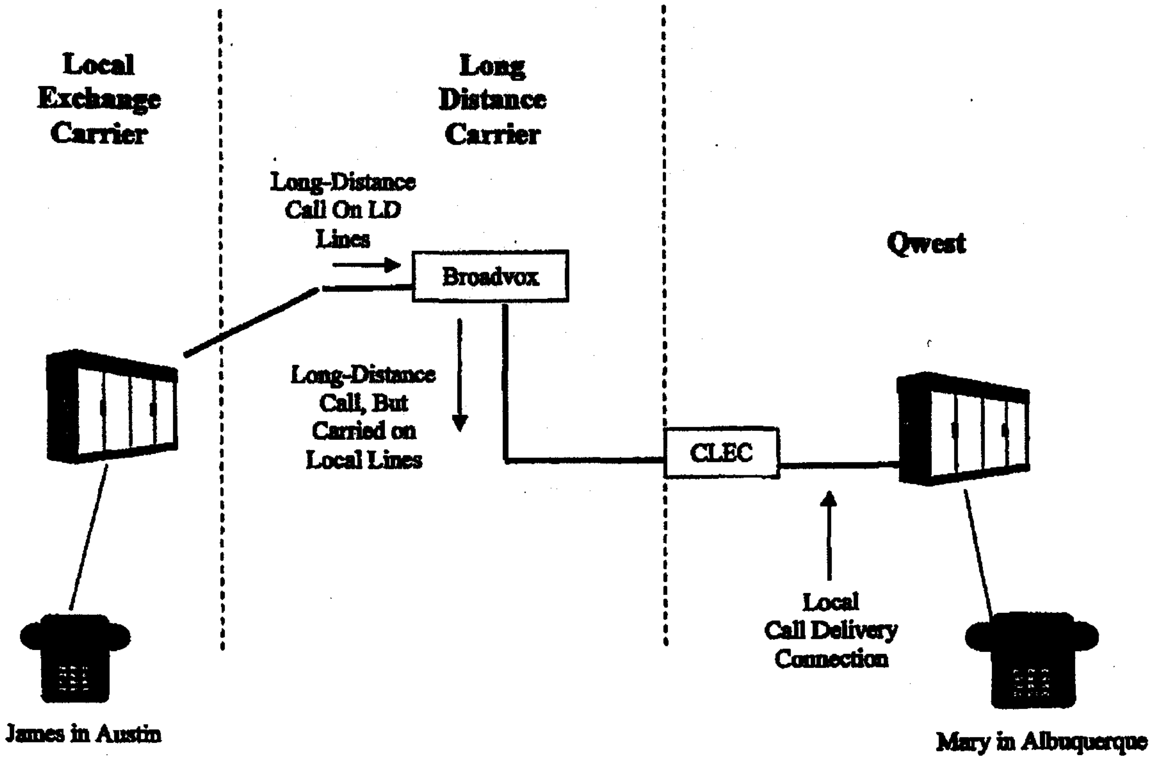
34. Diagram B depicts the basic model for delivery of long-distance calls.

DIAGRAM B



35. Diagram C depicts the ***rerouting*** of a normal long-distance call through a CLEC, caused by Broadvox's intervention in the call flow.

DIAGRAM C



36. The process used to pass long-distance calls to a CLEC can also alter the information related to the party who originated the call. For example, when Qwest receives the call, it may see the area code (or other information) of the PRI circuit that Broadvox has ordered from the intermediate CLEC, rather than the originating caller's area code (or other information). Therefore, not only does Qwest receive the call over a trunk designed for local calls, but the call now also carries a local phone number. The full extent of each CLEC's participation in the scheme is yet to be determined, but there may be some degree of complicity.

37. Because it provides for the transport of long-distance calls between local exchanges, Broadvox is itself an IXC. Broadvox advertises to local carriers that it is a "least cost

router." It tells the originating or intermediate IXCs that it can transport or complete long-distance calls at a substantially lower cost than typically available.

38. Broadvox claims that IXCs utilizing its service will "realize extensive savings (up to 70%) over traditional TDM carriers."[7]

39. Of course, if these assertions are true, it is largely (perhaps only) because Broadvox's scheme avoids paying the legally required terminating access charges for long-distance calls. Other IXCs pay these charges, consistent with the law. The "miscellaneous fees" that Broadvox "avoids" are in fact the access charges that belong to Qwest.

40. Broadvox's own promotional materials claim that the company converts long-distance calls from one of its IXC customers from the ordinary, circuit-switched format to "IP" or "VoIP" format. This means that Broadvox may transport the call using Internet-based packet switches, rather than by the traditional network of dedicated circuit switches and connecting facilities. Even if such a conversion actually takes place, however, Broadvox must convert the calls in this action back to the circuit-switched format prior before delivering the call to Qwest.

41. Even if the call is temporarily converted to IP, from the perspective of the called party, Broadvox does not add any functionality or enhancement to the call or its transmission.

42. Moreover, some calls never are converted to IP format, but remain in circuit-switched format for the entire call path.

43. To ensure that phone traffic is properly differentiated, carriers are required -- by FCC rule, federal and state tariffs, and their interconnection agreements -- to accurately report the originating location of a call. This information is customarily referred to as "automated

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[7] Broadvox, Voice Over Internet Protocol Value-Added Reseller Partner Program, http://www.broadvox.com/VARSpending.aspx.

number information" ("ANI") or "calling number identification" ("CNI"). In much simpler terms, it is often the caller's telephone number.

44. By the time a call handled by Broadvox reaches Qwest for termination, however, the caller's telephone number appears to have changed. In other words, after Broadvox carried the call for some distance, James' call to Mary would no longer have an Austin area code (512), but an Albuquerque area code (505).

45. Broadvox knowingly and intentionally receives ordinary long-distance traffic from other IXCs, then tells CLECs to which it is transmitting the calls that they are local calls that are not subject to higher long-distance access charges. It does so with the express intent that the CLEC route the long-distance traffic as local traffic to Qwest over the interconnection facilities (LIS trunks) designed for local traffic. Broadvox is thereby interconnected with Qwest's network, and understands that Qwest will terminate these long-distance calls using Qwest's terminating access services. Broadvox has failed to take reasonable steps to avoid receiving Qwest's terminating access services, and in fact intends that Qwest will terminate these calls by providing Qwest's terminating access services. Indeed, these calls can ***only*** be terminated through Qwest's terminating access services.

46. Broadvox's improper scheme prevents Qwest from distinguishing between local and long-distance phone traffic. Qwest thus is and has been unable to bill for a great deal of interexchange long-distance traffic delivered by Broadvox.

47. Qwest knows Broadvox sent long-distance traffic to Qwest over LIS trunks in at least five states where Qwest operates as an incumbent local exchange carrier.

48. Broadvox has routed at least ***135,000,000*** terminating long-distance calls to Qwest without paying access charges. The estimated access charges for these minutes total more than $1,100,000.

49. Broadvox has also routed millions of minutes of terminating long-distance traffic to Qwest through various intermediaries, and continues to do so today. The full extent of this improper long-distance traffic is much greater than Qwest has discovered to date.

C. The Temporary IP Conversion Does Not Alter the Applicability of Terminating Switched Access Charges

50. Broadvox maintains that its use of Internet protocol to transport ordinary long-distance calls eliminates any obligation to pay Qwest's terminating access charges. That is not the case. Under governing FCC authority, Broadvox's temporary conversion of a long-distance call does not magically change a long-distance telephone call into something else. Nor does it impact the applicability of Qwest's access tariffs.

51. IP technology is simply the latest of many different transmission technologies for delivering telephone calls. The choice of technology, however, makes no difference to the regulatory classification of a telephone call or the applicability of access charges. Under a longstanding line of FCC decisions, when a call begins and ends as an ordinary, circuit-switched telephone call, the transmission technology in the middle is irrelevant to the access charges. A long-distance call transported by Broadvox still must utilize Qwest's local facilities to complete that call, just like a call carried by any other IXC.

52. Qwest's claims in this case are limited to traditional long-distance calls, which both begin and end as ordinary circuit-switched telephone calls.

53. Broadvox carries these ordinary long-distance calls between local exchanges. Therefore, Broadvox is a common carrier and an interexchange carrier.

54. Broadvox is a common carrier because it plays an integral part in providing a common carriage service -- ordinary long-distance telephony.

55. Furthermore, Broadvox is a common carrier because it is a telecommunications carrier engaged in the provision of telecommunications services, as those terms are defined under the Federal Communications Act and correlative state law.[8]

56. Broadvox provides a service that has been expressly defined by the FCC as a common carrier telecommunications service.

57. Whether an entity is a common carrier depends on the service provided, not on how it may view or attempt to classify itself, or what reservations it seeks to limit its status.

58. Broadvox carries the long-distance calls that are the subject of this action between local exchanges. Broadvox is a link in this uninterrupted end-to-end common carriage service.

59. Broadvox does not differentiate one call from another call. Rather, it accepts and transports each and every call that is passed to it, for ultimate termination to the called party. Therefore, Broadvox provides non-discriminatory telecommunications services to the public or a segment of the public.

60. Broadvox provides its services for hire. It is paid by other IXCs from whom Broadvox receives the calls for further transport and termination. (These IXCs, the names of which are within Broadvox's possession, may also be complicit in Broadvox's scheme.) In turn, Broadvox pays a CLEC, to whom it transfers the calls, for the use of a PRI service that the CLEC provides on a common carrier basis. The CLEC then transfers the call to Qwest for termination over Qwest's access facilities. Qwest is a common carrier in providing its terminating access service.

8 47 U.S.C. §§ 3(44), 3(46).

61. Broadvox's contracts with its IXCs provide that Broadvox will accept all such calls passed to it by their connecting IXCs, will transport all of those calls, and will assure the appropriate termination of those calls to the intended end users, at specified rates.

62. Each of these contracts contains standardized terms and rates for the transport and termination services that Broadvox provides. The terms do not vary, at least not significantly, between customers. Further, the service provided by Broadvox to its respective connecting IXCs does not differ significantly among such respective carriers.

63. The long-distance calls Broadvox transports using IP protocol undergo two protocol changes, from circuit-switched protocol to IP protocol, and back again. These calls, however, undergo no "net protocol conversion," because they begin and end in the same circuit-switched format. The FCC has ruled that long-distance calls that undergo no "net protocol" conversion are subject to terminating access charges.

64. Further, for all of these calls, neither the caller nor the called party has any idea whether their long-distance call has been converted to IP format somewhere in the transmission path. The call was dialed and received in exactly the same manner as any other long-distance call. Customers receive no added functionality as a result of any potential IP conversion.

65. Neither the caller nor the called party has any idea that Broadvox was involved in transporting their long-distance call. Therefore, those persons have not requested any additional "features and functions" Broadvox may claim to provide. They do not even know that any such enhanced functionality is available on their call.

66. Broadvox's service, whether or not an IP conversion takes place, makes the same use of, and imposes the same burden on, Qwest's local exchange facilities for terminating the call as does an ordinary circuit-switched long-distance call.

C. The FCC Has Established That Phone-to-Phone IP Telephony Services Are Subject to Terminating Switched Access Charges

67. In 2004, the FCC ordered that long-distance telephone calls are subject to terminating switched access charges, even if the call undergoes a temporary IP format conversion. The FCC determined that, when an interexchange service "(1) uses ordinary customer premises equipment with no enhanced functionality; (2) originates and terminates on the public switched telephone network ("PSTN"); and (3) undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider's use of IP technology," the service provider is liable for terminating access charges.[9]

68. Furthermore, the FCC held: "Our analysis in this order applies to services that meet these criteria regardless of whether only one interexchange carrier uses IP transport or instead multiple service providers are involved in providing IP transport."[10]

69. Here, if Broadvox is using IP transport, its services fall within the criteria established by the FCC for applying terminating switched access charges.

70. First, in the long-distance calls at issue, the caller and the called party use ordinary customer premises equipment.

71. Second, these calls originate and terminate on the public, circuit-switched telephone network.

72. Third, these calls undergo no net protocol conversion, and Broadvox provides no enhanced functionality from the perspective of the end users, who have not requested and are not aware of, any purported enhanced functionality provided by Broadvox.

73. For some of these calls, Broadvox may not utilize Internet protocol transport at all, but may transport the call the entire way along a traditional, circuit-switched path.

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[9] *FCC IP-in-the-Middle Order* at 7457-58, ¶ 1.

[10] *Id.* at 7470, ¶ 19.

74. The FCC has stated that local exchange carriers, such as Qwest, should pursue civil actions to collect unpaid terminating switched access charges.[11]

COUNT I
(NON-PAYMENT OF FEDERALLY TARIFFED ACCESS CHARGES)

75. Qwest incorporates by reference as though fully set forth herein the allegations of paragraphs 1-74 of its Complaint.

76. Qwest's interstate terminating switched access charges for interstate long-distance calls are set forth in Qwest's FCC Tariff No. 1, pursuant to the federal Communications Act, 47 U.S.C. § 151.

77. Under the terms of Qwest's federal tariff, Broadvox is obligated to pay Qwest's terminating switched access charges. Broadvox knowingly and intentionally has sent interstate long-distance traffic to Qwest for termination via Qwest's local exchange switching facilities in numerous Qwest states, including at least Arizona, Idaho, Oregon, Utah, and Washington. Broadvox is therefore a "customer" under Qwest's FCC Tariff No. 1. That tariff specifies that "customer . . . denotes any individual, partnership, association, joint-stock company, trust, corporation, governmental entity or any other entity which subscribes to the services offered under this Tariff, including Interexchange Carriers (ICs), end users and interconnectors." Qwest FCC Tariff No. 1, § 2.6.[12] The services offered under that tariff include the terminating switched access service that Qwest provides to Broadvox.

78. Broadvox is also an "Interexchange Carrier," as defined by Qwest's FCC Tariff No. 1. That tariff provides that "[t]he term 'Interexchange Carrier' (IC) or 'Interexchange

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11 *Id.* at 7472, ¶ 23 n.93 ("[T]he Commission does not act as a collection agent for carriers . . . . Therefore, we expect that LECs will file any claims for recovery of unpaid access charges in state or federal courts, as appropriate.")

12 The full tariff is a public document that can be found at http://tariffs.qwest.com:8000/idc/groups/public/documents/tariff/htmltoc_fcc1.htm.

Common Carrier' denotes any individual, partnership, association, joint-stock company, trust, governmental entity or corporation engaged for hire in interstate of foreign communication by wire or radio between two or more exchanges." Qwest FCC Tariff No. 1, § 2.6.

79. Because Broadvox is not an end user customer under Qwest's tariffs, and is prohibited from purchasing service as an end user by those tariffs and FCC rules and regulations, it is required to purchase switched access service under Qwest's tariffs for termination of interstate long-distance communications.

80. Moreover, Qwest's federal tariff applies to the long-distance calls that Broadvox has caused to be routed to Qwest for termination because Broadvox subscribed to Qwest's services pursuant to the Constructive Ordering Doctrine. Broadvox was – and is – interconnected in such a manner that it expects to receive interstate terminating access service from Qwest. It has failed to take steps to prevent the receipt of such service, and it has received and continues to receive such service.

81. Qwest has fully performed its obligations under its federal tariffs.

82. Qwest has demanded, and Broadvox has refused to pay, the terminating switched access charges required by Qwest's federal tariffs.

83. Broadvox has materially violated Qwest's federal tariffs by failing to pay the tariffed rates for the services it has received and continues to receive.

84. Qwest has been damaged in an amount to be determined at trial.

COUNT II
(NON-PAYMENT OF STATE TARIFFED ACCESS CHARGES)

85. Qwest incorporates by reference as though fully set forth herein the allegations of paragraphs 1-74 of its Complaint.

86. Qwest's intrastate terminating switched access charges are set forth in state tariffs, schedules, catalogs, or price lists on file at the respective public utility/service commission.

87. Under the terms of each of Qwest's state tariffs, Broadvox is obligated to pay Qwest's terminating switched access charges. Broadvox knowingly and intentionally sent intrastate long-distance traffic to Qwest for termination via Qwest's local exchange switching facilities in numerous Qwest states, including at least Arizona, Idaho, Oregon, Utah, and Washington. Broadvox is therefore a "customer" under Qwest's various state access tariffs.

88. For example, in Qwest's Access Service tariff on file in Washington, "[t]he term 'customer(s)' denotes any individual, partnership, association, joint-stock company, trust, corporation, governmental entity or any other entity which subscribes to the services offered under this Tariff." Qwest Washington Access Service Tariff, WN U-44, § 2.6.[13] Qwest's other state tariffs contain similar a similar definition of "customer."[14]

89. Broadvox also is an "Interexchange Carrier" as defined, by example, in Qwest's Washington Access Service Tariff. That tariff provides that "[t]he term 'Interexchange Carrier' (IC) or 'Interexchange Common Carrier' denotes any individual, partnership, association, joint-stock company, trust, governmental entity or corporation engaged for hire in intrastate communication by wire or radio between two or more exchanges." Qwest Washington Access

[13] The full tariff is a public document that can be found at: http://tariffs.qwest.com:8000/idc/groups/public/documents/tariff/htmltoc_wa_a_t.htm.

[14] Arizona Access Service Price Cap Tariff Section 2.6 defines customer(s) as "any individual, partnership, association, joint-stock company, trust, corporation, governmental entity or any other entity which subscribes to the services offered under this Tariff." Idaho Access Service Catalog No. 1 Section 2.6 defines customer(s) as "any individual, partnership, association, joint-stock company, trust, corporation, governmental entity or any other entity which subscribes to the services offered under this document." Oregon Access Service Tariff Section 2.6 defines customer(s) as "any individual, partnership, association, joint stock company, trust, corporation, governmental entity or any other entity which subscribes to the services offered under this Tariff, including both Interexchange Carriers (ICs), end users and/or interconnectors." Utah Access Service Tariff and Price List Section 2.6 defines customer(s) as "any individual, partnership, association, jointstock company, trust, corporation, governmental entity or any other entity which subscribes to the services offered under this Tariff, including both Interexchange Carriers (ICs), end users and/or interconnectors."

Service Tariff, WN U-44, § 2.6. Qwest's other state tariffs contain similar a similar definition of "Interexchange Carrier."[15]

90. Because Broadvox is not an end user customer under Qwest's state tariffs, and is prohibited from purchasing service as an end user by those tariffs and the rules and regulations of the various state regulatory authorities in those states, it is required to purchase switched access service under Qwest's tariffs for termination of intrastate long-distance communications.

91. Moreover, Qwest's various state tariffs apply to the long-distance calls that Broadvox has caused to be routed to Qwest for termination because Broadvox has subscribed to Qwest's services pursuant to the Constructive Ordering Doctrine. Broadvox was -- and is -- interconnected in such a manner that it expects to receive intrastate terminating access service from Qwest. It has failed to take steps to prevent the receipt of such service, and it has received and continues to receive such service.

92. Qwest has fully performed its obligations under its various state tariffs.

93. Qwest has demanded, and Broadvox has refused to pay, the terminating switched access charges required by Qwest's various state tariffs.

94. Broadvox has materially violated Qwest's various state tariffs by failing to pay the tariffed rates for the services it has received and continues to receive.

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[15] Arizona Access Service Price Cap Tariff Section 2.6 defines Interexchange Carrier (IC) or Interexchange Common Carrier as "any individual, partnership, association, joint-stock company, trust, governmental entity or corporation duly authorized to engage for hire in intrastate communication by wire, fiber optics or radio between two or more exchanges." Idaho Access Service Catalog No. 1 Section 2.6 defines Interexchange Carrier (IC) or Interexchange Common Carrier as "any individual, partnership, association, joint-stock company, trust, governmental entity or corporation engaged for hire in intrastate communication by wire, fiber optics or radio between two or more exchanges." Oregon Access Service Tariff Section 2.6 defines Interexchange Carrier (IC) or Interexchange Common Carrier as "any individual, partnership, association, joint-stock company, trust, governmental entity or corporation engaged for hire in intrastate communication by wire, fiber optics or radio between two or more exchanges." Utah Access Service Tariff and Price List Section 2.6 defines Interexchange Carrier (IC) or Interexchange Common Carrier The term "Interexchange Carrier or Interexchange Common Carrier" as "any individual, partnership, association, joint-stock company, trust, governmental entity or corporation engaged for hire in intrastate communication by wire, fiber optics or radio between two or more exchanges."

95. Qwest has been damaged in an amount to be determined at trial.

COUNT III
(UNJUST ENRICHMENT)

96. Qwest incorporates by reference as though fully set forth herein the allegations of paragraphs 1-74 of its Complaint.

97. Pursuant to Qwest's federal and state tariffs, and the FCC IP-in-the-Middle Order, Broadvox is liable to Qwest for its failure to pay interstate and intrastate terminating switched access charges on long-distance traffic that Broadvox has caused to be delivered to Qwest for termination.

98. By terminating the long-distance calls carried by Broadvox to Qwest's local telephone customers, Qwest has conferred a benefit on Broadvox. Broadvox has caused this long-distance traffic to be misrouted and terminated by Qwest at the substantially lower termination rate charged for local traffic. The arrangement was and is unjust, to the benefit of Broadvox.

99. Broadvox has understood that the termination of long-distance calls by Qwest was important to Broadvox's customers, and accordingly it has recognized that Qwest's termination of long-distance calls was a benefit to them.

100. Broadvox has accepted and retained the benefit of Qwest's terminating switched access services.

101. Broadvox has not provided appropriate compensation to Qwest for having terminated these calls.

102. By accepting and retaining the benefit of Qwest's terminating switched access services without appropriately compensating Qwest, Broadvox has been unjustly enriched in an amount to be determined at trial.

COUNT IV
(FRAUD)

103. Qwest incorporates by reference as though fully set forth herein the allegations of paragraphs 1-74 of its Complaint.

104. For each long-distance call handed, either directly or indirectly, by Broadvox to Qwest for termination, Broadvox has knowingly, and with the intent to defraud, made material misrepresentations of material facts to Qwest, including (but not limited to):

a. Changing or causing to be changed or augmented, either directly or indirectly, the call record information to falsely indicate that the telephone call originated in the local exchange as a local call, when in fact that call originated in another exchange as a long-distance call, and had been carried to the local exchange as a long-distance call by Broadvox;

b. Routing the long-distance telephone call, or causing the long-distance call to be routed, over facilities expressly provisioned to carry local traffic, thereby knowingly and unlawfully avoiding terminating switched access charges.

105. These material misrepresentations were false and misleading at the time they were made.

106. Broadvox made each of these misrepresentations with knowledge of their falsity, or recklessly, as positive assertions, and without knowledge of their truth, intending to induce Qwest to terminate the long-distance calls routed to it by Broadvox.

107. Qwest relied on Broadvox's misrepresentations, to its detriment.

108. Due to Broadvox's fraudulent conduct, Qwest is unable to bill for the full measure of long-distance traffic that Broadvox has terminated over Qwest's local facilities, either directly or indirectly. The truth about the full scope of Broadvox's unlawful conduct remains within the

particular knowledge of Broadvox, which engaged in deceptive acts calculated to mislead and thereby obtain an unfair advantage.

109. Qwest has been injured as a direct and proximate result of Broadvox's misrepresentations in an amount to be determined at trial.

COUNT V
(FRAUD BY NONDISCLOSURE)

110. Qwest incorporates by reference as though fully set forth herein the allegations of paragraphs 1-74 of its Complaint.

111. For each long-distance call handed, either directly or indirectly, by Broadvox to Qwest for termination, Broadvox has knowingly, and with the intent to defraud, made material omissions or partial disclosures of material facts to Qwest, including (but not limited to):

a. Not informing Qwest that the telephone call was a long-distance telephone call subject to applicable tariff charges for terminating access services.

112. Through these omissions and partial disclosures, Broadvox created a false impression that the phone calls at issue were local, when they were actually long-distance in nature. Broadvox had a duty to disclose the true nature of these calls because Broadvox not only created false impression by making a partial disclosure, but it also voluntarily disclosed some information about the calls and therefore had a duty to disclose the whole truth.

113. These were material omissions to Qwest, as they would have been important to it in making decisions on how to bill Broadvox under applicable state and federal law.

114. These material omissions were false and misleading at the time they were made. Broadvox was deliberately silent about the nature of these calls, in order to gain financial advantage.

115. Broadvox made each of these omissions with knowledge of their falsity, or recklessly, as positive assertions, and without knowledge of their truth, intending to induce Qwest to terminate the long-distance calls routed to it by Broadvox.

116. Qwest was unaware of the fact that these were long-distance calls and did not have an equal opportunity to determine the truth.

117. Qwest reasonably relied on Broadvox's omissions, to its detriment.

118. Due to Broadvox's fraudulent omissions, Qwest is unable to bill for the full measure of long-distance traffic that Broadvox has terminated over Qwest's local facilities, either directly or indirectly. The truth about the full scope of Broadvox's unlawful conduct remains within the particular knowledge of Broadvox, which engaged in deceptive acts calculated to mislead and thereby obtain an unfair advantage.

119. Qwest has been injured as a direct and proximate result of Broadvox's omissions in an amount to be determined at trial.

<u>COUNT VI</u>
(TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONSHIP)

120. Qwest incorporates by reference as though fully set forth herein the allegations of paragraphs 1-74 of its Complaint.

121. When Qwest terminates long-distance calls using its local exchange facilities, Qwest, pursuant to its federal tariffs and its various state tariffs, is entitled to be paid its terminating switched access charges. Qwest's tariffs establish a contract between Qwest and its customers, including carriers who terminate long-distance calls using Qwest's local exchange facilities. Qwest expects that it will be paid its federal and state tariffed charges for providing terminating switched access when it, in fact, provides such terminating switched access.

122. To the extent that Broadvox maintains that its connecting IXCs, rather than Broadvox itself, are the parties liable to Qwest for terminating switched access charges pursuant to Qwest's federal and state tariffs, and to the extent that Broadvox is not found to be directly liable to Qwest for the payment of Qwest's tariffed terminating switched access charges, it is Broadvox's actions that interfered with Qwest's contractual relationships with these other IXCs.

123. But for Broadvox's fraudulent scheme and surreptitious intervention in the normal flow of the long-distance calls that are the subject of this action, Broadvox's upstream connecting IXCs would have delivered these calls to Qwest for termination in Qwest's local exchange over the access trunk facilities that are supposed to be utilized for the termination of long-distance traffic.

124. But for Broadvox's fraudulent scheme and intervention in the normal flow of the long-distance calls that are the subject of this action, Qwest would have been able to identify these calls as long-distance calls, and bill the IXCs passing these calls to Qwest the appropriate tariffed terminating switched access charges.

125. Broadvox had knowledge of Qwest's valid and enforceable relationships with these other IXCs.

126. Broadvox had knowledge of the access charge regime, and how that regime applies to long-distance calls.

127. Broadvox had knowledge that Qwest maintains both federal and state tariffs setting forth Qwest's terminating switched access charges.

128. Broadvox had knowledge that IXCs handing long-distance calls to Qwest for termination in Qwest's local exchanges pay Qwest these federal and state tariffed terminating switched access charges. In fact, Broadvox's business model is ***based*** on an understanding of

these terminating switched access charges, and a fraudulent scheme to terminate long-distance calls for IXCs at a lower cost by surreptitiously ***avoiding*** these terminating switched access charges.

129. Broadvox's fraudulent scheme and intervention in the normal flow of the long-distance calls that are the subject of this action interfered with Qwest's contractual relationships with these IXCs.

130. Broadvox's interference was willful and intentional, and caused a breach or termination of Qwest's contractual relationships with these IXCs.

131. As a consequence of Broadvox's interference, Qwest was proximately damaged, in an amount to be proven at trial, by the other IXCs' non-payment of tariffed terminating switched access charges appropriately payable for terminating long-distance calls.

<u>COUNT VII</u>
(DECLARATORY JUDGMENT)

132. Qwest incorporates by reference as though fully set forth herein the allegations of paragraphs 1-74 of its Complaint.

133. Pursuant to Fed. R. Civ. P. 57 and 28 U.S.C. § 2201, this Court has the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.

134. Broadvox knowingly and intentionally misroutes and disguises long-distance telephone traffic as local traffic to avoid paying applicable terminating switched access charges.

135. For each misrouted long-distance call passed either directly or indirectly from Broadvox to Qwest that is the subject of this Complaint,

a. the callers and called parties use ordinary customer premises equipment;

b. the call originates and terminates on the public switched telephone network;

c. the call undergoes no net protocol conversion; and

d. Broadvox provides no enhanced functionality from the perspective of the end users.

136. For the reasons set forth above, the traffic Broadvox causes to be routed to Qwest for termination is subject to the payment of terminating switched access charges, as specified in the FCC *IP-in-the-Middle Order*.

137. Qwest has suffered and will continue to suffer damages as a result of Broadvox's scheme. Accordingly, Qwest seeks a declaration that, in accordance with the FCC *IP-in-the-Middle Order*, and because of Broadvox's willful, intentional, and harmful acts against Qwest, the long-distance traffic that Broadvox causes to be routed to Qwest for termination is subject to the terminating switched access charges as provided in Qwest's federal and state tariffs.

PRAYER FOR RELIEF

WHEREFORE, Qwest prays that this Court grant it relief, as follows:

a. A judgment in its favor declaring that pursuant to the federal Communications Act, 47 U.S.C. § 151 et seq., the long-distance traffic that Broadvox has caused and continues to cause to be routed to Qwest for termination is subject to the terminating switched access charges provided in Qwest's federal and state tariffs, and that Broadvox is responsible for the payment of these access charges pursuant to the terms of these tariffs;

b. Money damages in an amount to be proven at trial, plus all applicable late fees;

c. All costs and attorney's fees incurred by Qwest, pursuant to 47 U.S.C. § 206 or as otherwise allowed by law;

d. Exemplary damages based on Broadvox's aggravated conduct;

e. Pre- and post-judgment interest, as allowed by law;

f. All other and additional relief to which Qwest may show itself to be justly entitled, whether at law or in equity.

Dated this 8th day of March, 2010.

Respectfully submitted,

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